United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

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75-1203

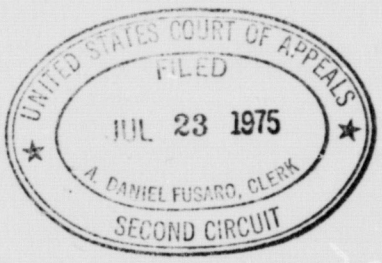
To be argued by
THOMAS J. CONCANNON

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ELVA MORALES, Appellant.	Docket No. 75-1203

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK



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QUESTIONS PRESENTED

1. Whether the lack of particularity in the indictment and the Government's constructive amendment of that indictment was so prejudicial as to require the reversal of appellant Morales' conviction.

2. Whether the evidence presented at trial was insufficient to sustain the Gotti-Morales conspiracy charge.

STATEMENT PURSUANT TO RULE 28(a)(3)

Preliminary Statement

This is an appeal from a judgment of the United States District Court for the Southern District of New York (The Honorable Marvin E. Frankel), rendered March 27, 1975, after a jury trial, convicting appellant Elva Morales of conspiracy to distribute and possess with intent to distribute cocaine in violation of Sections 812, 841(a)(1), and 841(b)(1)(A) of Title 21, United States Code. Appellant was sentenced to four years probation. The Federal Defender Services Unit of The Legal Aid Society was continued as counsel on appeal, pursuant to the Criminal Justice Act.

STATEMENT OF FACTS

In the early 1970's large quantities of cocaine were being spirited into the United States by Chilean diplomatic personnel of the Allende government. After the Allende regime toppled, a United States undercover informer named George Brana, using the name Tito Rodriquez, succeeded in infiltrating this operation by posing as an emissary of Vladimir Banderas (one of the Chilean exporters), who, having

been arrested in Chile, agreed to cooperate with the United States Government (78*). Under Drug Enforcement Administration supervision, Rodriguez obtained at least three pounds of cocaine in Chile from drug exporters Carmen Miranda, Guillermo Saavedra, and Marcos Aguirre (81-82).

Miranda, while in United States Federal prison on a previous narcotics charge had made plans with one Lena Gotes, another inmate who was Chilean by birth, to import and distribute cocaine in the United States after their release (165*). Consequently, Rodriguez, upon his arrival in New York, contacted Gotes for the purpose of transacting the cocaine with her and thereby learning the identities of the persons who purchased from her (78).

Gotes, who operated a dry cleaning store in Manhattan as a front for her narcotics activities, was at first hesitant to deal with Rodriguez. Overcoming her initial suspicions, Gotes eventually decided to deal with Rodriguez and began dealing with him in his ostensible capacity as an importer, often

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* Numbers in parenthesis refer to pages of the trial transcript.

** There was testimony at trial that appellant Morales was also acquainted with Miranda, although there was no evidence that she had ever had any narcotic dealings with Miranda, or even made any plans for such dealings (25, 26, 92).

speaking to him by phone from the cleaners, as well as meeting there with him and with Drug Enforcement Administration special agent Saverio Weidl, who was posing as Rodriguez's bodyguard (29-30, 79-80, 142-143). Rodriguez offered to sell the three pounds of cocaine to one of Gotes' customers at $10,000 per pound but Gotes asked Rodriguez to sell for $13,000 per pound instead so that Gotes might make a $3,000 per pound commission.

One of Gotes' regular cleaning customers was a woman of Puerto Rican ancestry named Elva Morales, whom Gotes had met several years before. Morales was apparently at the cleaners during one phone conversation between Gotes and Rodriguez, and inquired about the latter's identity. After an initial denial, eventually Gotes admitted that Rodriguez was a drug trafficker, and introduced Morales to him (by phone) giving her a matchbook embossed with the name of his hotel, at which Morales and Rodriguez were to subsequently meet (31,38-39, 83-84, 86-89). Gotes never discussed the price of the cocaine with Morales, nor did Morales ever pay Gotes for introducing her to Rodriguez (39, 40).

The meeting at the hotel took place on April 11, 1974. Morales arrived accompanied by a still unidentified girl. Meeting Rodriguez in the hotel bar, they proceeded to his room,

where Morales took a sniff of cocaine from a sample the Drug Enforcement Administration had prepared for that purpose. Rodriguez then called Agent Weidl, who brought in three one-pound packages of cocaine, one of which Morales examined. Told by Rodriguez, pursuant to his agreement with Gotes, that the price was $13,000 per pound, Morales indicated that the price was too high, but that she would try to raise the money.

Meanwhile, the unknown girl, who, once in the room, said only "a few words" during the whole negotiation, took some cocaine in her fingers into the bathroom where she presumably sniffed it, although neither Rodriguez nor Weidl actually saw her do so. Following the Morales-Rodriguez negotiation, Morales and the girl left. Morales took the sample with her, saying that she would give it to her customer (88-92, 138-140, GX7).

A subsequent planned meeting between Morales and Rodriguez never took place because Morales' car broke down. The Drug Enforcement Administration ultimately decided to attempt to sell the entire shipment of cocaine to one of Gotes' bulk purchasers, rather than selling to as small a buyer as Morales. The girl who accompanied Morales to Rodriguez's hotel room was never seen again (98-99, 102-103, 175).

Following the Drug Enforcement Administration decision not to sell to Morales, she was contacted by Rodriguez by phone, at which time she told him that she could have purchased the entire three pounds. Thereupon, Rodriguez offered to save "one" for her on his next trip to Chile (103, 164, 175). Morales was arrested on July 2, 1974 (154), having been indicted on June 6, 1974 with 17 other persons, including Gotes, for the Chilean conspiracy (74 Cr. 576). She was later severed and on December 19, 1974, Morales alone was charged, in a one-count superseding indictment, 74 Cr. 1189, with conspiring to distribute and possess with intent to distribute cocaine. Following a jury trial before Judge Frankel, she was convicted and, upon denial of her Rule 29 acquittal motion, sentenced. She then filed this appeal.

POINT I

THE LACK OF PARTICULARITY IN THE INDICTMENT AND THE GOVERNMENT'S CONSTRUCTIVE AMENDMENT OF THAT INDICTMENT WAS SO PREJUDICIAL AS TO REQUIRE THE REVERSAL OF APPELLANT MORALES' CONVICTION.

Both the initial and the superceding indictments in this case failed to state with requisite particularity the theory of conspiracy on which appellant Morales was to be tried. This defect was then compounded when the Government, during trial, wandered through four different theories of the alleged conspiracy in an effort to find one which fit the evidence presented. This variance was so substantial as to constitute an impermissible constructive amendment of the indictment by the Government. Both the lack of particularity in the indictment and the constructive amendment of that document by the Government during trial require reversal of appellant Morales' conviction.

A reading of both the initial and the superceding indictments in this case raises a serious question as to whether the grand juries that issued them had been presented with any concrete theory as to the conspiracy they were charging. The initial indictment, 74 Cr. 576, (set forth in appellant's separate appendix as "D") accused appellant Morales and seventeen other persons, among them Lena Gotes, of conspiring to import, possess and distribute cocaine. The superceding indictment (set forth in appellant's separate appendix as "B") charged that:

> . . . from on or about the first day of January, 1974, and continuously thereafter up to and including the second day of July, 1974, in the Southern District of New York, Elva Morales, the defendant, and others to the grand jury known and unknown, unlawfully, intentionally, and knowingly combined, conspired, confederated and agreed together and with each other to violate Sections 812, 841(a)(1) and 841(b)(1)(A) of Title 21, United States Code.
>
> (emphasis added)

The Government's initial theory of this case was that appellant Morales was part of a large conspiracy (hereafter referred to as the Chilean conspiracy) involving seventeen other persons named in the original indictment. Thus, in its pre-trial memorandum of September 22, 1974, (set forth as appellant's separate appendix "E") the Government represented that the evidence it would present against each of the eighteen defendants named in the initial indictment would be "substantially the same and would show that each was a member of the same conspiracy (Memorandum at 20); that the enumerated overt acts depicted the manner in which this overall conspiracy was carried out (Id. at 27); and that the conspiratorial agreement was that outlined in the indictment (Id. at 30).

In the superceding indictment, specific reference to alleged co-conspirators was replaced by the cryptic phrase "and others to the grand jury known and unknown." Thus, appellant Morales proceeded to trial with no way of knowing

whether the Government was still accusing her of participation in the Chilean conspiracy or, if not, just who she was being accused of conspiring with.

The Government, in its opening statement at appellant's trial, indicated that, despite the passage of the superceding indictment, the Government was still proceeding on the theory that appellant Morales was a participant in the eighteen person Chilean conspiracy charged in the original indictment. Thus, the prosecutor began by describing the Chilean conspiracy to the jury (12). Thereafter, his references to "the conspiracy" (14, 17) and appellant's alleged role in "the conspiracy" (13) were clearly references to the Chilean conspiracy he had just described. That the Government was advancing the Chilean conspiracy theory at the beginning of trial is further evidence by the prosecutor's statement that appellant Morales was not accused of being a "ringleader" of the charged conspiracy (19). Since there would be no ringleader in any of the other three conspiracy theories which the Government suggested at later points in the trial, this reference makes sense only if the Government was referring to the ringleader of the Chilean conspiracy.

As the trial proceeded, and the trial judge began to express doubts as to the Chilean conspiracy theory of the case, the Government began shifting ground in search of a viable theory, suggesting at various points that the charged

conspiracy was not the Chilean conspiracy the Government originally described to the jury, but rather was either a conspiracy between Morales and Gotes (110, 11, 115), or Morales and the unknown girl who accompanied her to Rodriguez's hotel room (110), or Morales and her unknown prospective customer or customers (110, 112). That these theories constituted a significant departure from the Government's original theory of the case is evidenced, for example, by the fact that the "unknown girl" who accompanied Morales to Rodriguez's hotel room was not even mentioned by the Government in its description of that meeting in its opening statement. Yet she was now being suggested by the Government as the only other participant in one of the Government's conspiracy theories, and evidence was admitted at trial as to her.

As a result of the Government's ambiguity as to what theory of conspiracy it was advancing, the trial court permitted the introduction of evidence concerning all of the theories. When it finally became apparent to the court that the Government had no viable theory of the case, the court tried to have the Government settle on one theory and then, failing that, ruled that the only conspiracy theory on which the case could go to the jury was the Morales-Gotes conspiracy (185, 193-4). Thereafter, the Government, while appearing to adhere to this theory of the case (187, 189, 192, 234, 235, 242, 245, 246, 249) continued making

references to the Chileans (182-3, 208, 209, 233, 238, 249, 250), the unidentified girl who accompanied Morales (193), and Morales' alleged customers (191, 192, 193, 194, 236, 239, 247). Even as to the Morales-Gotes conspiracy theory, the Government continued to imply that others were involved (153, 154), and in fact, after the verdict was rendered still maintained "that the evidence here was not simply of a single drug, conspiracy, or a single event . . . " (292). After trial, in its undated memo opposing defendant's acquittal motion, the Government similarly stressed the Morales-Gotes conspiracy theory (Memo at 3, 6-9), but apparently still had not abandoned the Chilean (Id. at 7, 9) or customer (Id. at 4-5) theories. The unknown girl conspiracy theory was apparently finally discarded.

A. <u>The indictment was so lacking in specificity as to be fatally defective</u>.

Rule 7(c) of the Federal Rules of Criminal Procedure requires that the indictment contain a "definite written statement of the essential facts constituting the offense charged." In the present proceeding, the body of the superceding indictment did no more than charge that appellant Morales and unnamed "others" had conspired to violate particular federal statutes. Similarly the overt acts charged provided little assistance in defining to appel-

lant Morales the theory of the conspiracy with which she was being charged and against which she would have to defend herself. Lena Gotes was nowhere mentioned in the indictment; consequently the indictment contained not even a suggestion of the Gotes-Morales conspiracy theory on which the case was fainlly submitted to the jury. The lack of requisite specificity is perhaps best demonstrated by the fact that the Government felt free at trial to stretch the perimeters of the indictment to include four distinctly different theories of conspiracy.*

Such lack of specificity is fatal to the indictment and the proceedings pursuant to it. The Supreme Court has clearly held that

> . . . where guilt depends so crucially upon such a specific identification of fact, our cases have uniformly held that an indictment must do more than simply repeat the language of the statute.
>
> (Hamling v. United States, 418 U.S. 87, 118 (1974); quoting Russell v. United States, 369 U.S. 749 (1962). (emphasis added)

Here, the question of Morales' innocence or guilt of the crime charged turned on the identity of her alleged co-conspirator and the nature of the illegal agreement they supposedly made. The indictment provided no identification

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* It is in fact, possible that the grand jury issued the indictment on the basis of a fifth conspiracy theory not mentioned by the Government - a theory of conspiracy between Morales and Rodriguez. That such a theory was the basis for the indictment is strongly suggested by the fact that Rodriguez is the only person repeatedly referred to in the overt acts of the indictment. Although such a theory may well have provided the basis for the grand jury indictment, the Government was naturally reluctant to advance such a theory at trial, since there can be no valid conspiracy between a defendant and an individual working undercover for the Government.

whatsoever of either of these contral fact issues.

The resulting prejudice to appellant Morales is apparent.

> [Such] a cryptic form of indictment . . . requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in gaps of proof by surmise or conjecture.
>
> (Russell v. United States, supra, 369 U.S. at 766.

See also Gaither v. United States, 413 F.2d 1061, 1071 (D.C. Cir. 1969). Given the total dirth of any "essential facts" in her indictment, appellant was forced to sit through a trial in which the Government wandered through four different theories of the conspiracy with which she was charged. Her conviction rested on a theory of conspiracy not even suggested in the indictment, and against which she had no reasonable opportunity to prepare to defend herself. Such prejudice requires reversal of appellant Morales' conviction and dismissal of the defective indictment.

B. The Government's changing theories of this case during trial, and the evidence introduced pursuant to those various theories constituted an impermissible constructive amendment of the indictment by the Government.

It is well settled that a defendant can only be tried and convicted upon an indictment as found by a grand

jury and that such indictment can only be amended by the grand jury itself. Ex Parte Bain, 121 U.S. 1, 9-10 (1887), reaffirmed in Stirone v. United States, 361 U.S. 212 (1960), and in Russell v. United States, supra. In those cases, as in the present proceeding, the Government or the trial court submitted the case to the jury on a theory which was substantially different from the theory on which the grand jury issued the indictment. Such variance is constitutionally impermissible in that it amounts to a constructive amendment of the indictment by the prosecutor or court, rather than by the only body authorized to make such amendment - the grand jury itself.

Although the lack of specificity in the indictment (see Point Ia, supra) makes it difficult to determine on exactly what theory of conspiracy the grand jury indicted, or how or with whom the grand jury believed appellant Morales had conspired, it is clear that the indictment was not issued on the basis of the Gotes-Morales conspiracy theory on which this case was finally submitted to the trial jury. Prior to the issuance of the superceding indictment, the grand jury had heard evidence about Gotes and her activities with appellant Morales, and had in fact, indicted Gotes along with Morales in the original indictment. Yet, Gotes was nowhere mentioned in the overt acts alleged in the superceding indictment. More importantly, Gotes was not named as a co-conspirator, which

would surely have been the case if the grand jury was indicting appellant Morales on the basis of a Gotes-Morales conspiracy theory. Virtually identical facts were found to be persuasive by the concurring judge in United States v. DeCavalcante, 440 F.2d 1264 (3d Cir. 1971). There, the Government's theory of the case at trial was that the appellant's theory of the case at trial was that the appellants had conspired with one Brennan and one Dello Russo. The concurring judge on appeal found that, as here,

> . . . because Brennan and Dello Russo were known to the grand jury, they would have been named by that body if the conspiracy was of the type pressed by the Government at trial. Therefore, the conspiracy theory presented by the Government [at trial] could not have been that outlined by the grand jury when it returned the charge.
>
> (Id. at 1277)

This, the judge found, amounted to an "amendment of the conspiracy indictment" requiring reversal of the appellants' convictions. (Id. at 1276).

That an improper constructive amendment occurred in this case is further evidenced by the Government's conduct at trial. The Government initially interpreted the indictment as charging the overall Chilean conspiracy and began trial articulating that theory to the jury. When the evidence the Government presented failed to sustain that theory, the Government proceeded to advance, at various points in the trial, no less than three other conspiracy theories

(Morales - unknown girl; Morales-potential customers; Morales-Gotes) before finally focusing, at the district Court's insistance, on the Morales-Gotes conspiracy theory on which the case was finally submitted to the jury. Even if the grand jury's theory of the case is unfathomable, this repeated and substantial variance by the Government at trial of its own theory of the case was so prejudicial as to require reversal of appellant Morales' conviction.

It is also clear that the district court, in finally limiting the Government to the Gotes-Morales conspiracy theory and instructing the jury that this was the only theory on which it could convict, did not do so out of a belief that the Gotes-Morales conspiracy theory had been the basis for the grand jury's indictment. Rather, the court looked only to the evidence which the Government was introducing, choosing the Gotes-Morales conspiracy theory as the only theory on which conviction could be sustained by that evidence.*

Whether such a variation in theory and proof is termed a "variance" or is so substantial to amount to a constructive amendment of the indictment, it was clearly highly

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* In fact, the court found substantial difficulty in identifying any conspiracy from the Government's evidence:

> . . . and as I listen to it, on the best version I can get of your evidence I have great trouble seeing what could amount to a conspiracy under the law here . . . I am having trouble knowing when it ended, because I have not got a clear idea anymore when it started, if it started, and if it was a conspiracy . . . I have great trouble knowing how to find the terminal point of something that I can't identify very well . . . I repeat, I have trouble seeing any conspiracy at all . . .
>
> (115, 117)

prejudicial to appellant Morales. As the Supreme Court held in reversing the appellant's conviction in Stirone v. United States, supra, 361 U.S. at 217:

> . . . the variation here destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury. Deprivaiton of such a bsic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error.

See also Russell v. United States, supra, 369 U.S. at 770; Jeffers v. United States, 392 F.2d 749 (9th Cir. 1968). Moreover, the constitutional imfirmity of such variation is not remedied merely because the theory which the Government finally submits to the jury is a legally valid one:

> Such variance is fatal in this case for while a conviction based on the theory now advanced by the Government may be permissible, we cannot say from the record before us that such was the theory adopted by the petit jury or grand jury or that they adopted the same theory. Therefore we reverse . . . Even if the latter [theory] was proved at trial, we cannot say that such was intended to be charged by the grand jury, for the indictment is susceptible of being construed to charge the former [theory]. . .
>
> (Jeffers v. United States, supra, 392 F.2d at 752-3.)

In addition to the denial of her constitutional right to have a grand jury first judge the sufficiency of the Government's theory of the case, the variation here prevented appellant Morales from preparing before trial to

defend herself against the theory of the crime which was finally submitted to the trial jury. Indeed, given the Government's continual state of flux during the trial itself, she was prevented from preparing or presenting a defense or confronting the Government witnesses even during that proceeding. This continual shifting of the Government's theory of the case also prevented the court from effectively limiting the Government's evidence, despite repeated defense objection (see e.g. 112, 152, 178, 197). In fact, it was difficult for even the defense to determine what evidence was relevant. The constitutional violations and prejudice arising from this variation require that appellant Morales' conviction be reversed.

POINT II

THE EVIDENCE PRESENTED AT TRIAL WAS INSUFFICIENT TO SUSTAIN THE GOTES-MORALES CONSPIRACY CHARGE

During the trial, the district court informed the Government that the Gotes-Morales conspiracy theory was the only theory on which the case could be submitted to the jury. The court similarly instructed the jury that this theory was the only one on which the jury could render a verdict of guilty. The evidence presented at trial, however, was insufficient to sustain Morales' conviction on that theory.

Interpreting the evidence in the light most favorable to the Government, that evidence showed only that Gotes and Rodriguez, a Government informer, made plans to sell Rodriguez's cocaine for their mutual profit and that Gotes thereafter introduced Morales to Rodriguez for the purpose of effectuating such a transaction. While this evidence may have showed that Gotes and Rodriguez were conspirators, and that Gotes, acting as Rodriguez's agent, introduced Morales to Rodriguez, it provided no evidence whatsoever of the requisite conspiratorial agreement between Gotes and appellant Morales.

This and other circuits have repeatedly rejected the notion that a mere buyer and seller are co-conspirators:

> . . . the buyer's purpose is to buy;
> the seller's purpose is to sell.
> There is no joint objective.
>
> (United States v. Ford, 324 F.2d 950 (7th Cir. 1963).

See also United States v. Borelli, 336 F.2d 376, 384 (2d Cir. 1964). The mere agreement of a seller to sell and a buyer to buy an illegal item is not an agreement which will sustain a charge of illegal conspiracy. Rather, conspiracy is established only where the evidence additionally shows either that the buyer purchases the item for the "purpose of securing to the [seller] the fruits of their [illegal transaction]," (see e.g. United States v. Zeuli, 137 F.2d 845, 847 (2d Cir. 1943)), or where there is some evidence of an agreement between buyer

and seller continuously to transact in the contraband. See e.g., United States v. Borelli, 336 F.2d 376, 384 (2d Cir. 1964). Absent such evidence, the transaction or attempted transaction does not constitute a conspiracy.

Applying the first test, Gotes and appellant Morales clearly shared no common purpose in the attempted transaction attested to at trial. Appellant Morales, like the typical "buyer" had as her only purpose the purchase of an item. Gotes, as the agent of seller Rodriguez, shared his purpose - to obtain a profit from the transaction. Gotes testified that Rodriguez agreed to pay her a commission of $3,000 per pound for arranging for the sale of the cocaine. At another point she also testified that although she wan't sure, she might also have expected something from appellant Morales after the transaction was completed. In either case, her interest, like the seller's, was in obtaining a profit by effectuating the transaction. Moreoever, as in the typical buyer-seller relationship, Gotes' profit from a completed transaction was to be at Morales' expense. Rodriguez increased the price of the cocaine at Gotes' request so that she could receive a commission from him for its sale. Whether Gotes profited from the transaction through receipt of this commission, or whether she received some direct payment from Morales after the transaction was completed, her profit only increased Morales'

expenditure for the transaction. It is precisely this divergence of interests that has led the courts to reject the theory of a conspiracy between a buyer and a seller. United States v. Ford, supra; United States v. Zeuli, supra.

Similarly, there was no evidence in this case to establish an agreement between Mroales and Gotes to cooperate with each other "for whatever period they continue to deal in this type of contraband." United States v. Borelli, supra, 336 F.2d at 384. As in Borelli, the attempted transaction attested to in this case provides no basis for inferring such an agreement (Id. at 384). Similarly, the gratuitous statement of Government informer Rodriguez to Morales after their attempted transaction had failed, that he would bring her "one" on his next trip to Chile, was insufficient to imply even a set agreement between Rodriguez and Morales. It provided no evidence whatsoever of an agreement between Gotes and Morales to continue to cooperate with one another for whatever period they continued to deal in cocaine.

The Government's evidence, if credited by the jury, might well have been sufficient to sustain a conviction for the substantive crime of attempted possession of cocaine. The Government, however, chose not to indict Morales for that crime but rather for conspiracy. Since the trial record lacks any evidence of the requisite conspiratorial

agreement, appellant Morales' conviction for that crime must be reversed.

CONCLUSION

FOR THE ABOVE-STATED REASONS, THE APPELLANT'S CONVICTION SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

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July 23, 1975

Certificate of Service

July 23, 1975

I certify that a copy of this brief and appendix has been mailed to the United States Attorney for the Southern District of New York.

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